No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILWAY COMPANY, APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

BRIEF OF THE INTERSTATE COMMERCE COMMISSION OPPOSING MOTION TO DISMISS THE APPEAL OR TO AFFIRM

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This brief is filed by the Interstate Commerce Commission in opposition to the motion filed by the appellee "to dismiss this appeal, or in the alternative, to affirm as presenting no substantial question requiring further argument, under the provisions of Rule 7, Paragraphs 3 and 4."

I.

The appellee's first ground for its motion to dismiss the appeal is that:

> "The appeal was not perfected within thirty (30) days as required by U. S. C. Title 28, Section 47 (Act of October 22, 1913, 32, 38 Stat. 220), which provides that appeals from an order granting or denying an interlocutory injunction after notice and hearing shall be *'taken within thirty days after the order* * * *'* and *upon final hearing* of any suit brought to suspend or set aside, in whole or in part, any order of said commission *the same requirement as to judges and the same procedure as to expedition and appeal shall apply."*

The appellee admits, however, that 28 U. S. C., section 47a, provides that:

> "* * * 'A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court * * * if appeal * * * be taken by an aggrieved party within sixty (60) days after the entry of such final judgment or decree, * * * And in such cases the notice required shall be served upon the defendants in the case and upon the Attorney General of the State.'"

That the appeal here was taken from a final decree (R. 71) the appellee concedes. The point it makes is, apparently, that, since the statute contains the wording that upon final hearing "the same procedure as to expedition and appeal shall apply" as specified for in interlocutory hearing and injunction, this is to be read to require that

the appeal from a final injunction must be taken within 30 days even though the immediately succeeding sentence (38 Stat. 220) reads that:

> "A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal be taken to the Supreme Court by an aggrieved party within 60 days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the State."

In view of this express provision allowing 60 days for an appeal from a final decree, it is apparent that the prior language is not to be taken to foreclose such right. The purpose of the prior language, so far as it relates to appeals, is, it is plain, to make the provision for *direct appeal* to the Supreme Court apply to the final hearing and appeal as well as the interlocutory hearing and appeal. And there is no occasion, therefore, to give it a reading in direct conflict with the express provision in the succeeding sentence.

The appellee, it is true, further urges that the provision

> "And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the State"

shows that the appeals which an aggrieved party is given the right to take within 60 days are limited "to those in which the State has some direct interest." But it is not believed that the statute can be read as leaving the right depending upon a "fine" differentiation between the orders of this Commission in the respect of the quantum of interest had by the State therein. The statute provides for notice to the attorney general and leaves to him the question of the State's interest. As for the practice under the statute: This Court's records will show that very many appeals have been taken after 30 days from entry of final decree, and without effort to establish just what was the interest of the State therein.

I–A

The appellee's second ground for its motion to dismiss the appeal is that the order allowing the appeal was signed by the District Judge only (R. 76), whereas, so it contends, the statute's requirements as to three judges "applies to all matters finally disposing of the cause, such as the granting of the petition for appeal * * *"

The case of *Tagg Bros.* v. *United States*, 280 U. S. 420, involved a suit to set aside an order of the Secretary of Agriculture under the Packers and Stockyards Act, section 316 of which makes the Urgent Deficiencies Act "applicable to proceedings brought to restrain or annul orders of the Secretary" (p. 432). There an interlocutory in-

junction was first entered and subsequently the case was heard by the three judges upon final hearing. The opinion of this Court reads at p. 433:

> "* * * After considering it in connection with that which had been introduced before the Secretary, the court found for the defendants and entered a final decree dissolving the interlocutory injunction and dismissing the bill. 29 F. (2d) 750. The District Judge allowed an appeal to this Court under sec. 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. C., Tit. 28, sec. 345 (4)."

The footnote indicated reads that:

> "In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. * * *"

It appears from the above that the order allowing an appeal, the right to which is expressly granted by the Urgent Deficiencies Act to an aggrieved party (*Int. Com. Comm.* v. *Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14, 24), is not such step as the statute requires be taken by the three judges, but is a step that may be taken by the District Judge. This being the case prior to the recent amendment of the Urgent Deficiencies Act (58 Stat. 198, 28 U. S. C. sec. 792), which would appear to cover and include such authority,

that amendment was not necessary to confer on the District Judge authority which he already had.

II

In that part of the motion, asking that the lower court's decree be affirmed, the appellee, after setting out portions of the lower court's opinion and an excerpt from the appellants' jurisdictional statement, alleges that (pages 5–6):

> "There is nothing in the entire record here, especially is there nothing in the decision of the District Court that affects joint rates. The District Court decided the issues presented under well-recognized principles of applicable law having to do with the reasonableness, justice, and nondiscriminatory character of the tariff of the Appellant, which affects only the Appellant and has nothing to do with joint rates, as was found as a matter of law."

The Commission's order here involved directs the appellee to cancel its tariff I. C. C. No. 81 to the extent that it "provides for refund, or cutback, to the shipper on (cottonseed) traffic originated and hauled to mill points on its lines "by other rail carriers," but leaves it undisturbed so far as it provides for such refunds on seed which it hauls to the mill points itself (R. 10–11). By the tariff provision, found to be unlawful by the Commission, the appellee holds itself out to make such rate-refund on seed hauled to the mill points by other carriers, conditioned upon the "out-

bound" products processed therefrom being shipped *via* its line to marketing destinations. When securing in this way an "outbound" shipment for movement *via* its lines, the appellee absorbs the refund made to the shipper out of its division of joint "outbound" rates to which it is a party with other carriers. The appellee "is not a party to the inbound rates" involved "and no other carrier is a party to its tariff" offering the refunds. (R. 9.)

As judged by its allegation, above quoted, taken together with the portions of the lower court's opinion which it sets out, the appellee's position is that its tariff could not be found to be unlawful by the Commission since the refunds which it makes and itself absorbs neither affect the revenue received by the other carriers nor render its own divisions unprofitable and, since the rates (minus the refunds) were not found to be either unreasonable or unjustly discriminatory. But the Commission was not concerned with the questions as to whether the provision for the rate-refund would, if lawful, render the appellee's divisions unprofitable, or the rates borne by shippers unreasonable or unjustly discriminatory; nor is its authority limited to such character of unlawfulness. *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402, 406–407. The Commission's immediate concern was with the question as to whether the tariff provision was lawful as one conforming to the basic requirements of the Act

governing the publication, maintenance, and observance of tariffs of rates and charges. The Commission found that it was not and its finding is amply supported by facts and reason.

The appeal from the lower court's decree setting aside the Commission's order presents questions which the Commission believes are very substantial both in respect of the merits and its authority over the tariffs filed with it and it, therefore, asks that the appellee's motion be dismissed.

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